Company Receivers and Managers, by James O'Donovan, Sydney, The Law Book Company Limited, 1981, lxxxiii + 545 pp. $47.50.

The first comment to be made about this book is that it fills a substantial gap in legal literature, and will be very helpful to practitioners who, whether occasionally or often, have to deal with company receivers and attempt to unravel some of the difficult problems to which company receiverships can give rise. There was no Australian text on the subject, and *Kerr* largely ignores the substantial body of Australian case law and even now, in its 15th edition, has not entirely eliminated the imbalance as between its treatment of receivers appointed by the Court and those appointed out of Court. O'Donovan's research of the authorities — Australian and English, particularly, but also Canadian and New Zealand — has obviously been very thorough indeed: this reviewer, at least, is unable to fault it. Additionally, the author recognises — expressly, and by the thoroughness of his treatment — the relative importance of the receiver appointed out of Court. There is useful discussion of important topics such as set-off, the interaction of receivership and liquidation and the application to receivership of certain principles of private international law. Furthermore, the arrangement of the book is logical and sensible and it is well indexed: as a result, a practitioner will have little difficulty in finding what the author has to say on any particular aspect of law relating to company receivers. In sum, the book will be a necessary point of reference for any lawyer practising in the field which it covers.

There is, however, another side of the coin. It may not be unfair to suggest that the gestation period of four years may have been a little short for an undertaking of this size: the research is thorough, but there are signs of incomplete digestion, some of them quite surprising. For instance, *Luckins Case*[1] is not really authority for the sweeping proposition for which it is cited at p. 38: that case made it clear that the obligation to register a charge in a State arose only if the company, at the time of creation of the charge, had a place of business or carried on business there. Secondly, the assertion is made, at p. 40, that a receiver and manager may not be validly appointed under a charge which should be registered but is not: unless the company is in liquidation, that simply is not so.[2] Again at p. 51, the author suggests that the holder of a debenture granted by a trustee may be a *bona fide* purchaser of the legal estate for value without notice: how could this be, if his charge (as will undoubtedly be the case, unless it is a very unusual debenture) is equitable only? Similarly, at p. 53, the author suggests that on one view a charge which crystallises becomes a fixed *legal* charge: but how could that (except, possibly, in some very unusual circumstances) be so? A *legal* charge of choses in action, for instance, or chattels, or even Torrens Title land? There is an important omission (the effect of s. 215 of the Income Tax Assessment Act, 1936) from the section on company tax on p. 72 (that provision is, however, discussed in a

[1] (1975) 133 C.L.R. 164.
[2] See the authorities cited in Gough, *Company Charges,* pp. 331 ff.

different context, at p. 149). The comments on the decision of Yeldham, J. in *Costain Australia Ltd.* v. *Superior Pipe*[3] seem odd: although the charge attaches to assets acquired after crystallisation, it attaches as a fixed, not a floating, charge — why, therefore, were his Honour's observations incorrect? The discussion of the order of application of moneys received (pp. 147, 148) appears to overlook the fact that, under the terms of most debentures, the costs of enforcement and the receiver's remunerations will be part of the secured debt.

To take two, perhaps more substantial, examples. The extended discussion, in Chapter 8, of set-off and lien, is valuable: it may be suggested, however, that it would have benefited from further analysis from the standpoint of legal principle (here it must be confessed that *Meagher, Gummow and Lehane,* Chapter 28, falls, to some extent, into the same trap). The author painstakingly analyses and classifies the cases; but it may be suggested that matters become clearer if one shifts one's gaze from the topic of set-off in receivership to the general principles relating to set-off and then makes the enquiry, what is the effect on the application of those principles of the crystallisation of a charge and the appointment of a receiver. Again, there is in Chapter 12 a valuable examination of the interaction between receivership and liquidation, but at one important point the analysis stops unexpectedly short. The author suggests that it is unfortunate, as a practical matter, that a receiver should be compelled to cease carrying on the business of the company as a going concern upon the commencement of the winding up of the company. But is he compelled to do so? Certainly he cannot carry the business on as agent of the company (his agency comes to an end on winding up) but why cannot he do so as principal, indemnified out of the charged assets and also, no doubt, by his appointor? It is clear (as the author points out) that the receiver may continue to exercise other powers (for example, a power for sale), though no longer as the company's agent; what is the distinction, in principle, between the power to carry on business and any other power?

At the risk of giving a false impression by protracting this litany, there are one or two other comments which should be made. The first relates to the discussion of receivers appointed by the Court. A reading of the author's chapters on this topic leaves the clear impression that, with very few exceptions, the authorities are quite old and are, at least in the context of company receiverships and managements, showing their age. This leads to some quaintness. On the authority of a case decided in 1850, the author asserts, on p. 322:

> If it finds that the appointment ought not to have been made the court has several courses open to it. First of all, it may order that the receiver keep within the bailwick (*sic*) for a certain period, say fourteen days, enough property to answer the execution creditor's demand.

Again, in accordance with his duty to keep the money safe, the receiver is, apparently, on the authority of cases decided in 1820 and 1805, to avoid country banks and use city banks only, to which he should transmit his funds by the "best bills he can find". Moreover, the discussion of the

[3] [1975] 1 N.S.W.L.R. 491

receiver's obligation to account (particularly from p. 448) assumes that all the authorities in relation to vouching and passing of accounts, appropriate, perhaps, in the case of a receivership of an income-producing parcel of real estate or the assets of a partnership about to be dissolved, apply equally to the receivership and management of all the assets of a large corporation. If that really is so, it is perhaps not surprising that secured creditors will not consider asking the Court to appoint a receiver, except as a very last resort. But is it really so? Could not the order of the Court be moulded so as to produce a more sensible result? Again, a rather deeper analysis would have been useful of the way in which propositions laid down in old cases and different contexts might be applied or developed for receiverships of the kind with which the author is concerned.

Again, there are points at which the author's enquiries into what happens in practice have led to some strange results. For instance, Chapter 2 opens with the statement that the standard form of mortgage debenture "empowers the registered holder of the debenture, with the written consent of the holders of the majority in value of debentures issued by the company, to appoint by writing a person to be the company's receiver . . .". That, at least in this reviewer's experience, would be the rare exception rather than the rule. Similarly, it is surprising to discover (on p.520) that mortgage debentures usually provide that the debenture holder shall have power to appoint an inspector. Further, the picture (pp. 44 and 159) of unwary receivers stumbling into an appointment and then muddling along without adequate legal advice as to the validity of their appointment or as to their powers and duties once appointed, seems somewhat outdated, and as a matter of fact, in virtually all cases, there is not much difficulty in advising a receiver as to the validity of his appointment: in view of the urgency usually involved, an application to the Court is, perhaps, the last thing that a receiver or his appointor would contemplate with equanimity. On the question of the manner of the receiver's appointment, two comments should, perhaps, be made. One is that the requirement, in New South Wales, of registration of the appointment in the General Register of Deeds is not referred to in Chapters 5 and 6, but it is an essential step; nor is it pointed out that the common practice of appointment by deed is a highly desirable practice, if only for the reason that the only agent who can execute a deed is one appointed by deed. In the context of practical requirements, the curious footnote 24 on page 37 is perhaps worth mentioning: the author there states that in some States certain documents may not be stamped after their execution. So far as this reviewer is aware, there is no State in which a document may be stamped before it has been executed: it is upon first execution that it becomes stampable.

Three things should be said about this list of comments. One is that the list has been compiled somewhat at random, and is not exhaustive. The second is that while some of these points may seem rather trivial in themselves, the cumulative effect of coming upon matters such as these when reading the book through is somewhat disconcerting, to say the least. The third is, however, that it should not be taken, from these comments, that the work, as a whole, is not a useful and valuable addition to legal

literature. It is, but there is scope to make it considerably more so in the next edition.

Finally, it should be said that the book is well printed and that the number of typographical and similar errors is very small. There are a few, but none of any particular consequence.

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